IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-89

HAROLD O. SWANK, Director, Illinois Department of Public Aid, et al.,

Petitioner,

vs.

GLADYS RODRIGUEZ, LORETTA SMITH, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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August 7, 1974

Printed by Authority of the State of Illinois

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Director of the Illinois Department of Public Aid, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 9, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported, and hence appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 9, 1974. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of the date of the entry of the Court of Appeal's opinion. The Court's jurisdiction is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1) Whether an order that beginning February 1, 1973, $100 in "compensatory damages" is to be awarded to AFDC applicants whose applications are pending more than thirty days is barred by the Eleventh Amendment to the United States Constitution.

2) Whether there are federal statutory bars to money awards being granted to welfare recipients.

CONSTITUTIONAL PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects or another foreign State."

STATEMENT OF THE CASE

On November 9, 1972, the United States District Court for the Northern District of Illinois ordered $100 compensatory damages to be paid to AFDC applicants whose applications were processed after thirty days. Defendants appeal that order in this Court.

Plaintiffs brought this class action on behalf of applicants eligible for assistance under the Aid to Families with Dependent Children Program (hereinafter referred to as "AFDC") whose determination of eligibility and receipt of their first assistance check occurred longer than thirty days after application. The complaint requested that the Court order a mandatory obligation on the part of defendants to comply with the "30-day regulation" promulgated by the Department of Health, Education and Welfare. If defendants did not comply, plaintiffs requested retroactive benefits to be paid. A motion to dismiss the Complaint was filed by defendants and denied by the court. See *Rodriguez* v. *Swank*, 318 F. Supp. 289, affd. 403 U.S. 901, 29 L. ed. 2d 677.

On October 29, 1970, a three judge panel ordered defendants to make all determinations of eligibility for AFDC within thirty days from the date of application and to cause eligible applicants to receive their first check at that time. The Court awarded retroactive payments to the thirtieth day after application to those whose applications were processed late after December 18, 1969.

On February 9, 1972, the Court modified its decree to state that commencing on April, 1972, if more than 10% of the applications were not processed within thirty days, that county would be denied federal funds. During the month of May, 1972, the figure would be 5%, and any

sum not paid by federal funds would be paid wholly from funds of the State of Illinois.

On March 13, 1972, defendants' motion to amend the Court's orders of October 29, 1970, and February 9, 1972, were granted and applicants were entitled to AFDC assistance retroactive only to the 30th day after application. The Court ordered defendants to strictly comply with the 30-day requirement for payment of certain welfare benefits except under unusual circumstances.

On October 27, 1972, arguments were heard and two remedies were suggested by plaintiffs. (1) $100 compensatory damages for late processing, and (2) presumptive eligibility after thirty days. On November 9, 1972, the court ordered that after February 1, 1973, *any* AFDC application pending more than thirty days, through no fault of the applicant, and subsequently acted upon favorably, will entitle the applicant to $100 compensatory damages in addition to the regular benefits received. On February 8, 1973, the Court denied defendants' request for a stay stating "the appropriate forum to make that request is the Court of Appeals."

An appeal then followed to the Court of Appeals. It was based substantially on the same grounds as are raised in this petition for writ of certiorari. On Appeal, the Seventh Circuit withheld its decision until after this Court decided the related case of *Edelman* v. *Jordan*, —— U.S. ——, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) decided on March 25, 1974.

On May 9, 1974, the Seventh Circuit affirmed the District Court order. On Appeal, it was pointed out by petitioners that an action for a monetary award filed against state officials in their official capacity, the award to be dis-

charged out of the Illinois General Revenue Fund, could not be maintained in the federal district court in view of the provisions of the Eleventh Amendment to the United States Constitution. On May 9, 1974 the Seventh Circuit Court of Appeals rejected that contention, affirmed the District Court order and found that the $100 monetary award given to welfare recipients did not contravene the prohibitions of the Eleventh Amendment to the United States Constitution.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

THE DOCTRINE OF SOVEREIGN IMMUNITY BARS MAINTENANCE OF A CLAIM FOR COMPENSATORY DAMAGES AGAINST THE STATE OF ILLINOIS.

The disposition of the question raised in this petition is of crucial importance to the State of Illinois since the State must be in the financial position to match its expectant costs of administering state government against its anticipated revenue. The financing of state government, in Illinois, for example, is unlike that of the Federal Government. States are unable to finance budgetary deficits with either the application of monetary controls or the ability of a federal reserve open market committee to use treasury bills and notes to raise required sums of money for additional financial outlays. The state's ability to borrow is severely restricted by statutes. Hence, a state must rely upon its ability to project and raise revenue under various revenue raising schemes, limited though as they are, such as state income taxes, retailers' occupation taxes, use taxes, a lottery and other sundry revenue measures. The state's cash outgo must be conscientiously controlled by strict adherence to budgetary processes. The reason for that strict control lies in the limited financial resources available to local and state government.

The AFDC program is funded 50% by the State, the other 50% is provided by the Federal Government under the Social Security Act.

The number of people receiving welfare benefits in the State of Illinois has grown from 424,665 in February,

1967 to well over one million at the present time. There are over 206,000 AFDC families at present. In 1971 alone, 397,298 new recipients were added to the welfare rolls. The annual cost of welfare in Illinois for the fiscal year 1972 was $1,018,078,753, and the current budget is over $1,500,000,000. The order of the District Court in the instant case could lead to great fiscal disruption of the body politic since the total liability is imprecise, open ended in amount and unanticipated by the legislature in its co-operative appropriation of funds for welfare. See Jaffee, *Suits Against Government and Officers: Sovereign Immunity*, 77 Harv. Law Rev. 1-29 (1963)

The question whether a federal district court may entertain jurisdiction over a claim for a monetary award for benefits wrongfully withheld has substantial impact upon the ability of local government to function and meet its responsibilities under its various statutory obligations.

Plaintiffs contend that defendant, Director of the Illinois Department of Public Aid, by noncompliance with HEW regulations (Record p. 152 et seq., Rules and Regulations § 206.10(a)(3)), has wrongfully withheld welfare payments (AFDC) which plaintiffs have been entitled to receive. Even if the Department was in violation of HEW regulations, plaintiffs are barred from maintaining their claim for compensatory damages by the Eleventh Amendment to the United States Constitution.

Historically, the Eleventh Amendment has been held a bar to an action in the U.S. District Court which sought to obtain state governmental funds or property. In such instances, this Honorable Court has held that such an action is barred by the Doctrine of Sovereign Immunity embodied in the Eleventh Amendment.

In the following cases, this Court has emphasized that, even if unconstitutional conduct was involved, a request for affirmative relief, though nominally directed against an officer of the state, was precluded because of the state's immunity from suit. For example, in *Louisiana* v. *Jumel*, 107 U.S. 711 (1883), where the plaintiffs had instituted actions to compel state officials to levy and collect certain taxes in order to carry out the state's obligations under bonds issued by the state, it was held that the action could not be maintained because of the state's immunity from suit. It was said that the remedy sought, to be complete, would require the Court to assume the executive authority of the state, insofar as it related to the enforcement of the law requiring collection of additional taxes. See also *Hagood* v. *Southern*, 117 U.S. 52 (1886); *North Carolina* v. *Temple*, 134 U.S. 22 (1890); *Louisiana ex rel. New York Guarantee and Indemnity Company* v. *Steele*, 134 U.S. 230 (1890); and dicta in *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682 (1949).

In still another large number of cases it has been emphasized that even if an officer's conduct is unconstitutional, the action against the officer is barred by the doctrine of governmental immunity if the purpose of the action is to obtain government funds or to obtain property which is in the government's possession, or to control the disposition of property in the government's possession.

For example, in *Murray* v. *Wilson Distilling Company*, 213 U.S. 151 (1909), the plaintiff sought to enjoin members of the state's Liquor Dispensary Commission from disposing of funds without paying the plaintiff's claim for liquor purchased by the Commission. Although the

plaintiff claimed that the Commission's funds constituted a trust fund for the benefit of those who had claims against the Commission, this Court rejected that contention and held that the funds belonged to the state, thus making an action involving the funds one against the state, prohibited by the doctrine of Sovereign Immunity embodied in the Eleventh Amendment. See also the holdings in *Louisiana* v. *Jumel, supra; Hagood* v. *Southern, supra; Naganab* v. *Hitchcock*, 202 U.S. 473 (1906); *Carolina Glass Company* v. *South Carolina*, 240 U.S. 305 (1916); *Great Northern Life Insurance Company* v. *Read*, 322 U.S. 47 (1944); *Ford Motor Company* v. *Department of Treasury*, 323 U.S. 459 (1945); and *Mine Safety Appliance Company* v. *Forestal*, 326 U.S. 371 (1945).

Additionally, the Eleventh Amendment has been held a bar to suits for monetary awards to compensate for personal injuries or property damages under a federal statute. *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 186 (1964) (suit for damages for personal injury under the FELA); *Ex parte New York*, 256 U.S. 490 (1921) (an admiralty suit for property damages due to negligence). Such cases exemplify the firmly rooted tradition that consent is required to impress treasury liability for a tort.[1] The whole area is extremely sensitive because liability is imprecise in amount, and could lead to great fiscal disruption of the body politic. See Jaffee, *Suits Against Government*

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1. It was pointed out in *Edelman* v. *Jordan*, —— U.S. ——, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) that the mere fact of State participation in a federally funded program "is not sufficient to establish consent on the part of the State to be sued in the federal courts." 39 L. Ed. 2d at 679.

and Officers: Sovereign Immunity; 77 Harv. Law Rev. 1-29 (1963).

Cases considering the Eleventh Amendment in the context of welfare payments are particularly pertinent. In *Westberry* v. *Fisher*, 309 F. Supp. 12 (D. Me. 1970), the plaintiff attempted to recover damages and retroactive payments from state officials in both their private and official capacities on the theory that Maine's maximum grant regulations limiting welfare funds available to large families had been invalidly enforced against the plaintiffs. The Court in *Westberry* held that a suit against defendant welfare officials in their official capacity was in substance a suit against the State, even though the State was not named as a party defendant, because any recovery would have to be paid out of the state treasury. 309 F. Supp. at 18, citing, *inter alia*, *Kennecott Copper Co.* v. *State Tax Comm'n.*, 327 U.S. 573, 576-577 (1946); *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, 463-464 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 51 (1944). In rejecting plaintiff's plea for monetary damages, the Court reasoned:

> Plaintiffs argue strenuously that the line of cases beginning with *Ex Parte Young*, 209 U.S. 123 (1908), * * * provides the basis for the recovery of damages against the State in this case, despite the bar of the Eleventh Amendment. Concededly, it has been settled law since *Ex Parte Young* that suits against state officials to enjoin them from unconstitutional action are not forbidden by the Eleventh Amendment. * * * To date, however, the Supreme Court has not seen fit to extend the doctrine of *Ex Parte Young* to permit the recovery of monetary damages. *In those cases in which the recovery of money from the state treasury has been sought, the court has consistently ad-*

> *hered to the rule that a state cannot be sued in a federal court without its consent.* [Citations omitted.] 309 F. Supp. at 19. [Emphasis added].

The issue was squarely decided in the case of *Francis* v. *Davidson*, 340 F. Supp. 351 (D. Md. 1972). A three judge District Court unanimously held that the Eleventh Amendment barred plaintiffs' claims for retroactive welfare payments. In that case a group of unemployed fathers had brought an action against defendants, administrators of Maryland's welfare program, in their individual and representative capacities, seeking injunctive relief as well as damages in the form of AFDC benefits claimed to be due them. Reaching the issue of sovereign immunity, the court explicitly held:

> Approaching the case as one against the State, all claims herein for damages must fail. * * *
>
> [T]he Eleventh Amendment not only bars, without the consent of a state, a federal court suit against that state by citizens of another state, but also by citizens of its own state. * * * In this case, the defendants speaking in behalf of the state of Maryland, have not only not waived that bar but indeed vigorously press it. * * * Additionally, this Court holds that the Eleventh Amendment, when asserted on behalf of the State as it is herein, precludes this Court from requiring payment of any claim. 340 F. Supp. at 370.

Concerning those cases which had granted retroactive benefits, the *Francis* Court was sharply critical. "[I]n most of these cases, the Eleventh Amendment problem was apparently either not raised or not faced. And in none of them has any satisfactory reason been advanced for avoiding the bar of the Eleventh Amendment." 340 F. Supp. at 371. This point will be discussed later in

reference to *Edelman* v. *Jordan*, —— U.S. ——, 94 S. Ct 1347, 39 L. Ed. 2d 662 (1974).

Other cases reaching the same result as *Westberry* and *Francis* on the Eleventh Amendment issue include *Williams* v. *Dandridge*, 297 F. Supp. 450, 452, 459 (D. Md. 1969), *rev'd on other grounds*, 397 U.S. 471 (1970); *Dews* v. *Henry*, 297 F. Supp. 587, 592 (D. Ariz. 1969); *Shepheard* v. *Godwin*, 280 F. Supp. 869 (E.D. Va. 1968). See also, *Employees of the Department of Public Health and Welfare* v. *Dandridge*, 297 F. Supp. 450, 452, 459 (D. Md. 1969), (8th Cir. 1971) *cert. granted*, 92 S. Ct. 1294 (1972) (*en banc*) affirmed April 18, 1973, —— U.S. ——, 36 L. Ed. 2d 251, 93 S. Ct. ——, (suit against State to recover unpaid overtime compensation and damages under Fair Labor Standards Act barred by Eleventh Amendment since Congress did not condition the operation of the Act on the State's forfeiture of immunity from suit in a federal forum); *Knight* v. *State of New York*, 443 F. 2d 415 (2nd Cir. 1971) (Friendly, J. affirming denial of plaintiff's request to amend complaint to permit suit against New York State Commissioner of Transportation). The court in *Rothstein* v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972) *cert. denied*, 411 U.S. 921, 36 L. Ed. 2d 315, 93 S. Ct. 1552 (1973), strongly rejected the argument on Sovereign Immunity set forth by the Seventh Circuit. See also *Employees of Dept. of Public Health and Welfare* v. *Dept. of Public Health and Welfare*, —— U.S. ——, 36 L. Ed. 2d 251, 93 S. Ct. ——.

Unquestionably, action brought against officials of the Department of Public Aid constitutes an action brought against the sovereign barred by the immunity doctrine. In *Ford Motor Company* v. *Department of Treasury of In-*

diana, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 857 (1945), this Court enunciated the following rule:

> . . . when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. 323 U.S. at 464, 89 L. Ed. at 394.

Those welfare decisions discussing the Eleventh Amendment question have reached the same conclusion:

> To the extent the plaintiffs seek to hold defendants herein liable for damages * * * as officers of the State * * * "such a suit is in actuality one against the State, even though the State is not named as a defendant."

Francis v. *Davidson*, 340 F. Supp. at 370, quoting *Westberry* v. *Fisher*, 309 F. Supp. at 18.

The payments sought in the instant case are clearly to be taken from the state coffers rather than the pockets of the individual nominal defendants. In *Hawaii* v. *Gordon*, 373 U.S. 57 (1963), this Court restated the general rule that "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." 373 U.S. at 58. Here, the judgment is directed specifically against the Illinois Department of Public Aid. The District Court in discussing the contempt charge, did not even purport to go against the Director personally (unlike the court in *Young* (*supra*) but consistently termed this an action against the Department generally. Other cases to the same effect as *Hawaii* v. *Gordon* (*supra*) include *Kennecott Copper Corp.* v. *State Tax Commission*, 327 U.S. 573 (1946); *Ford*

Motor Co. v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944); *Hamilton Manufacturing Company* v. *Trustees of State Colleges in Colorado*, 356 F. 2d 599 (10 Cir. 1966) (denying Federal Court jurisdiction on Eleventh Amendment grounds).

A second line of cases also relevant to the facts in the current case has denied federal jurisdiction on a variation of the sovereign immunity theory. In *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682 (1949), Chief Justice Vinson declared:

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina* v. *Temple*, 134 U.S. 22 (1890); 337 U.S. at 682.

While the *Larson* case involved federal officers, the principles applied therein have been assimilated into the Eleventh Amendment immunity of the states doctrine. See, *e.g.*, *Knight* v. *State of New York*, 443 F. 2d 415, 418-421 (2nd Cir. 1971); *Employees of Department of Public Health and Welfare* v. *Department of Public Health and Welfare*, —— U.S. ——, 36 L. Ed. 2d 251, 93 S. Ct. ——. Since the order in the instant case specifically envisions affirmative action on the part of the defendant officers, the doctrine of sovereign immunity bars the monetary recovery.

II.

THERE ARE FEDERAL STATUTORY BARS TO MONEY AWARDS BEING GRANTED TO WELFARE RECIPIENTS.

The District Court ordered that "any AFDC application pending more than thirty days, through no fault of the applicant, and subsequently acted upon favorably, will entitle the applicant to $100 compensatory damages in addition to the regular benefits received." In arriving at this decision it is interesting to note that in the order of November 9, 1972, at p. 6, the Court stated:

> By necessary implication, however, a delay of longer than thirty days is unreasonable and those who are forced to suffer the additional wait, without fault on their part, should be *deemed to have incurred compensable damages. Otherwise, the state would not have any incentive to fully comply with the law* . . . [Emphasis supplied].

There are no provisions for penalties such as the $100 award granted herein on which the court could base its decision. The $100 grant is not found in the Federal regulations. It is a grant to public aid recipients which Congress never intended. It is also not included in the Illinois Public Aid Code nor in the Social Security Act. The only remedy provided by Congress for statutory and regulatory violations of welfare legislation and, as a consequence for protecting the Federal Treasury, was a prospective cut-off of funds. Congress clearly was sensitive to the potential for serious drain on the Federal structure inherent in a grant program of great magnitude and complexity. Therefore, the states, through the incentive of matching grants, were to be encouraged to make gener-

ous use of their funds to aid their impoverished citizens; however, they were not to be deprived of their freedom to ultimately determine whether, and how, State funds were to be spent. The cut-off of federal funds is the only remedy provided in the Social Security Administration Act to welfare recipients. Clearly, Congress never permitted nor did it intend the requirement of $100 compensatory damages to be a remedy for noncompliance with the Social Security Administration Act.

To allow an award of $100 to each late processing of a welfare applicant would certainly cause a significant increase in state tensions that would result inevitably from a court order requiring the state to expend its funds against its will. It is further noted and the District Court found specifically that there was no bad faith on the part of the State.

The cut-off of federal funds is the only remedy provided in the Social Security Administration Act to welfare recipients. As previously stated, Congress never permitted nor did it intend the requirement of a $100 award as a remedy for noncompliance with the Social Security Administration Act. This fact is also borne out by this Court's decision in *Rosado* v. *Wyman*, 397 U.S. 397 (1970). In that case, this Court stated (397 U.S. 397 at 421-2):

> . . . we remand the case to the District Court to fix a date that will afford New York an opportunity to revise its program in accordance with the requirements of § 402(a)(23) if the State wishes to do so.
>
> • • •
>
> . . . or, should New York choose not to submit a revamped program by the determined date, issue its order restraining the further use of federal monies pursuant to the present statute.

It was urged, nevertheless, by the respondents that their right to relief is based on a federal cause of action. The petitioners demonstrated that this federal cause of action cannot be statutory in nature since there is no such remedy as a $100 award provided in the Social Security Act. Thus, the award granted by the Seventh Circuit should be barred as contravening Federal Statute.

III.

THE GRANT OF COMPENSATORY DAMAGES CONSTITUTES AN INAPPROPRIATE EXERTION OF THE EXTRAORDINARY POWERS OF EQUITY IN THE FEDERAL-STATE WELFARE CONTEXT.

It has been stated by this court that, "as in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex Parte Young* will not in many instances be that between day and night." *Edelman* v. *Jordan* (*supra*, 39 L. Ed. 2d at 675).

This case falls factually somewhere between *Edelman* v. *Jordan*, *supra*, and *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).* In *Jordan* this Court,

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* An interesting intermediate alternative application of the facts is suggested by Professor Monaghan, "Constitutional Adjudication: The Who and When," 82 Yale Law Journal, No. 7 (June 1973) 1363, 1387-89. He suggests that injunctive relief was granted in such cases as *Ex parte Young* prior to the development of declaratory judgments. Since declaratory relief is now available he states that the sovereign immunity and Eleventh Amendment doctrine "Should be viewed as limiting only the *remedies* available to the federal court," since the his-

in reversing a District Court decree, barred the retroactive award of benefits, that is, payment of benefits which were not processed within the federally mandated time period, prior to the District Court order requiring compliance with the federal time schedule on Eleventh Amendment grounds.

In *Ex parte Young, supra*, this Court upheld the validity of a United States Circuit Court order restraining the Attorney General of Minnesota from enforcing a state statute on railroad rates which the Federal Court had found to be unconstitutional. As Mr. Justice Douglas points out in his dissenting opinion in *Edelman* v. *Jordan*, (*supra*, 39 L. Ed. 2d at 685), if the Eleventh Amendment and *Hans* v. *Louisiana* (*supra*) are taken literally, then *Ex parte Young* should be overruled. The principle, however, under which the Eleventh Amendment was found not to be a jurisdictional bar to the Federal Court action was that ". . . individuals, who, as officers of the state, are clothed with some duty in regard to the en-

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torical function of the Eleventh Amendment was to bar unauthorized raids on the public treasury [Emphasis added] (at p. 1388). He goes on to state,

> "To my mind, sovereign immunity should bar only coercive relief. Where no such relief is sought, I see no reason why it should bar a declaratory judgment on the legality of any governmental action. Should the public official ignore the declaration, that is his business; but the court is under no obligation to avoid declaring what the duty is . . ."

It seems that the "monetary touchstone" would prevent the suggested remedy of the district court under this standard.

forcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." (209 U.S. at 155-156).

This theory is expanded later in the opinion to state that:

> ". . . If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States . . ." (209 U.S. at 159-160).

The contempt alleged in this case does not purport to be personally against the Director of the Department of Public Aid, but is consistently referred to as an action against the Department in general and the State.

In *Jordan* this Court barred retroactive payments to be made from the State treasury. *Ex parte Young* permits prospective injunctive relief against state officials acting in violation of Federal law. Here we are faced with the situation where the District Court issues an order which prospectively may require the payment of substantial sums, clearly not from the pockets of the state officials, but from the State treasury.

The Court of Appeals took the position that the distinction between *Jordan* and *Ex parte Young* was primarily that between prospective and retroactive relief.

Since the relief granted in the instant case was prospective only, it was not barred by the Eleventh Amendment as interpreted by this Court in *Ex parte Young* and in *Jordan*.

It is the contention of petitioners that the real distinction between *Ex parte Young* and *Jordan* was that *Young* dealt with an injunction against a state official and *Jordan* dealt with an order requiring payments of money from the State treasury.

The distinction here is of course not between day and night. As was pointed out in *Jordan*, "The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues," and "Later cases from this Court have authorized equitable relief which has probably had greater impact on State treasuries than did that awarded in *Ex parte Young*." (*Jordan, supra*, 39 L. Ed. 2d at 675).

Petitioners nevertheless submit that this case must come under *Jordan*, because "it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pocket of the individual state official, who was the defendant in the action . . ." (39 L. Ed. 2d at 676).

It is clear from the opinion in *Edelman* v. *Jordan* that a suit by private parties seeking to impose a liability payable from public funds in the state treasury is foreclosed by the Eleventh Amendment if the State does not consent to suit. A federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective *injunctive relief* (i.e., conforming state action with federal law), and may not include an award

which *requires the payment of funds from the state treasury* (39 L. Ed. 2d at 680). The federal sanction provides termination of future allocation of federal funds when a participating State fails to conform with federal law. "This provision by its terms does not authorize suit against anyone . . ." (39 L. Ed. 2d at 679). Indeed, the House of Representatives has shown an awareness that it is the proper body to provide sanctions, by seeking passage of H.R. 16311 (See Footnote 16 at p. 679). In the case at bar, suit against the State is foreclosed since recovery is sought from the State treasury.

Petitioners in *Jordan* conceded that the court could enjoin them from failing to process applications within the time limits established by the federal regulations. However, this does not extend so far as to permit a suit which seeks the award of money which must be met from the general revenues of a State (See p. 12). This Court in *Jordan* cited *Rothstein* v. *Wyman*, 467 F. 2d 226 (CA 2, 1972) *cert. den.*, 411 U.S. 921 (1973) with approval at 39 L. Ed. 2d, pp. 673-674. The standard the Court there set was: "The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and *thus the award resembles far more closely the monetary award against the State itself* [citing *Ford*] than it does the prospective injunctive relief [i.e., enjoining the Attorney General of Minnesota from enforcing a statute violative of the Fourteenth Amendment] awarded in *Ex parte Young*." It is respectfully submitted that the award in this case resembles far more closely the award in *Ford* than it does in *Young* or, indeed, any case cited by this Court in *Jordan* which allowed a suit against the State. For instance, this Court cites at (39 L. Ed. 2d at 675), *Graham* v. *Richardson*, 403

U.S. 365 (1971) where the Court enjoined the enforcing of an Arizona statute which conditioned eligibility for welfare benefits on U.S. citizenship or U.S. residence for 15 years as violative of the Fourteenth Amendment. This Court also cites *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) where the Court, in balancing the rights of the citizen against the fiscal rights of the State, enjoined the enforcement of the State post-termination hearing procedure as violative of the minimum procedural safeguards required by the Fourteenth Amendment. This Court goes on to cite other District Court cases which allowed a suit against the State. *Shapiro* v. *Thompson*, 394 U.S. 168 (1969) (the only case where the Eleventh Amendment objection was presented) like *Graham* (*supra*) involved residency requirements. In *State Dept. of Health* v. *Zarate*, 407 U.S. 918 (1972), the Eleventh Amendment was not raised as an issue, but, like *Graham*, the case involved residency requirements for welfare eligibility. The case of *Gaddis* v. *Wyman*, 304 F. Supp. 717 (S.D.N.Y. 1968), which also did not address the Eleventh Amendment, again was concerned with Fourteenth Amendment rights and allowed the suit against the State to protect those rights.

Conversely, in the *Ford* case, cited by this Court in *Jordan*, suit was not allowed against the State. The *Ford* case was a suit against state officers for a tax refund which would have required the State to dip into its treasury to pay such an award. The suit was barred by the Eleventh Amendment. This Court in *Ford* noted that the true nature of a suit is to be determined, not by the nomenclature of retrospective, prospective, equitable restitution, or damages, but by the essential "nature and effect" of the suit. The common thread that flows

through each case cited by this Court in *Jordan* is that in balancing the State's fiscal, administrative and constitutional right not to be sued, and the ever increasing importance of the citizen's due process and equal protection rights under the Fourteenth Amendment, the State will be required to put all citizens on equal footing and comply with federal law. But, as in *Ford* and *Jordan*, where the State agrees that it must treat all citizens equally, the Court may not dip into the state treasury to correct any allegedly unfair situation. By so doing, it is well recognized that solution of problems is most desirable through legislative action which can be amended, altered or deleted if it does not solve the problem. In cases involving the Federal Constitution, however, correction through legislative action is practically impossible (See 39 L. Ed. 2d at 677, footnote 14).

In the case at bar, the purpose of the $100 award which is given in ADDITION to regular benefits, payable retroactive to the date of application, is not to give Fourteenth Amendment rights to the plaintiffs; but, as the District Court stated, to punish the State. By so doing the State would be charged with the payment of monies not allotted by the legislature — the very evil the Eleventh Amendment was enacted to prevent. This action is better characterized as a judicial invasion into the state treasury rather than a judicial enforcement of the rights of plaintiffs. Indeed, plaintiffs would not be in an equal position with all other eligible applicants. Plaintiffs would be a separate class of eligible applicants entitled to receive an additional $100 award over their regular benefits.

This Court in *Jordan* did not allow the suit for payments wrongfully withheld. The case at bar involves an

added extension of the Court's jurisdiction requiring the State to spend more money than was reasonably foreseeable at the time that the State chose to participate in the federally funded program. The Court in *Jordan* stated at 39 L. Ed. 2d at 675, the District Court's decree would require the payment of state funds "not as a NECESSARY consequence of compliance in the future with a substantive federal question determination, but as a form of compensation to those whose applications were processed on the slower-time schedule . . ." This Court then looks at the practical effect of such a decision stating "it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds." The "ancillary effect" on the state treasury which the Seventh Circuit refers to as permissible is quite different from the award respondents seek. While those cases must allow more people in established categories of assistance, this case would establish an entirely new category of people to receive an award. Rather than requiring the State, injunctively, to comply, the District Court order, in fashioning a unique remedy, would require the State to pay damages to a new category. Such court action against the State could create fiscal havoc. The State only agreed to participate in the program to the extent that all those who are eligible would receive a limited amount of money, limited by the ability of the State, the legislature's desire to participate, and the extent to which it would participate. The cases which permit a suit against the State cited in *Jordan* each involve situations of compliance wherein the *State was given notice and could reasonably have foreseen its own liability.* There was never any question on the part of the State in those

cases that all those qualified would be granted benefits. Those cases merely involved the question of who was qualified. The award in this case was not reasonably foreseeable nor contemplated so that the State legislature could determine whether the budget could withstand the additional burden. This case does not involve an interpretation of existing laws and remedies, but the creation of new liabilities to which the State cannot be deemed to have agreed.

Any difference between the awards in *Jordan* and *Rodriguez* cannot be said to be between the past and future breach of a duty, but whether the resulting reward is a NECESSARY consequence of future compliance. The $100 award to plaintiffs can hardly be termed a NECESSARY consequence of future compliance. Indeed, such remedy has no statutory authority so it can hardly be termed necessary. The only "necessary consequence" of future compliance is that all those who are eligible receive all monies due to them. That does not include a $100 bonus. In judging the award actually made in each case (as the *Jordan* court suggested) in the context of the important constitutional principle embodied in the Eleventh Amendment, this case is a classic example of the need for application of separation of powers. The Court may require compliance with existing law in this case, but it is barred from requiring affirmative action by the State to spend unquestionably sovereign funds in a new area. New experiments in carrying out welfare programs should not be frozen into the constitutional structure, but should be left to legislative determination.

Whether relief should be barred or not cannot be determined by mere nomenclature such as "prospective or

retrospective." This Court stated in *Jordan* that Courts must look to the essential nature and effect of the relief. It is manifest from the cases cited in *Jordan* that prospective relief is granted *only* to protect a citizen's Fourteenth Amendment rights by requiring the State to conform its future CONDUCT to the requirements of the Fourteenth Amendment. But this case, as the *Jordan* case indicates, "goes much farther" than protecting Fourteenth Amendment rights. The relief herein enforces no statutory rights by interpretation, but requires the State to take affirmative action in a new area which must be met, not by future conduct of an individual personally, but by future funds to be taken from the general revenue of the State. Prospective relief has never been granted in a case of this nature and, indeed, should not be granted in this case. This Court denied relief in *Jordan* since "it is in practical effect indistinguishable in many aspects from an award of damages against the State." It defies logic to view the $100 award in this case in any other way but as having a practical effect indistinguishable from an award of damages against the State. This is clearly barred by the Eleventh Amendment as interpreted by this Court in *Jordan*.

IV.

THE CREATION OF A NEW REMEDY OF $100 COMPENSATORY DAMAGES CONSTITUTED AN ABUSE OF THE COURT'S DISCRETION.

The trial court held that "the pre-determined damage remedy appears to be the most sensible and practical solution to the problem."

Respondents asserted that $100 would be a fair and reasonable figure. The Court rejected the idea of a "sliding scale" stating: "The court's purpose here is to force increased efficiency, not add to the administrative duties already present." Thus, late processing "will entitle the applicant to $100 compensatory damages in addition to the regular benefits received."

The Court alternately spoke of the $100 as an incentive for the State to increase efficiency and for compensating applicants. It is clear from the record and transcript of proceedings that the $100 is a penalty for the State's supposed tardiness (Transcript, p. 15). The Court did not grant this amount in order to satisfy the ascertained needs of impoverished persons, for they received their regular benefits retroactive to the date of application, but rather, to punish the State and to stimulate, in the Court's view administrative efficiency. The characterization of the $100 as compensatory damages does not alter the fact that the court intended it to be a penalty. As a monetary award, this penalty would be chargeable against the general revenue fund of Illinois.

The amount calculated for compensatory damages was completely arbitrary and not based on any proper evidence; rather, it rested upon the suggestion offered by plaintiffs' counsel, who said: "We have estimated the amount to be appriximately $100." (Transcript, p. 11). No evidence was offered, let alone adduced, to substantiate that estimate. No rational basis for damages was ever mentioned.

It is respectfully submitted that it was beyond the court's discretion to impose arbitrary fines or create novel incentives for the State to efficiently process ap-

plications at the expense of State funds which had not been appropriated for such use.

It is recognized that in some instances welfare applicants living at subsistence levels, might be indeed aggrieved in having to wait even one day for their payments. On the other hand orderly administrative procedure which redounds to the benefit of *all* welfare recipients is, as the District Court recognized, time-consuming and at least some period of minor delay is administratively necessary and unavoidable. Most applications are processed in the period of 20 to 40 days with the vast majority in the period of 25 to 30 days [Transcript p. 43]. Considering these administrative realities, it is respectfully submitted that it was an inappropriate exercise of the court's equity jurisdiction to order the future expenditure of scarce state funds as "compensation" for a past grievance which, however deplorable, could not be undone.

In each of the past several years, the Illinois General Assembly has been asked to enact an emergency deficit appropriation to meet the needs of welfare recipients under the Categorical Assistance Programs. Accordingly, every dollar appropriated has been paid to the class of welfare recipients now before this Court. The body politic has not retained an extra dollar of the AFDC appropriation: it has not turned back any funds to the Illinois General Assembly; and the taxpayers have not had any of their taxes reduced thereby.

Moreover, and more importantly, the compensatory damage awards will hamper effective investigation of potential applicants and will increase the number of fraudulent claimants eventually receiving benefits. The cost to the State and to the Federal government is potentially

very high. This ultimately would have the effect of reducing the amount of funds available for disbursement to welfare recipients with the resultant effect that some persons grievously in need of financial aid would not receive any moneys or, at best, severely reduced amounts. The *Edelman* v. *Jordan* decision seeks to avoid such a disastrous result (39 L. Ed. 2d at 674, footnote 11). Thus it is respectfully submitted that all available funds should be applied to relieve existing deprivations.

Furthermore, the administrative costs involved in carrying out the court's order will not only be out of proportion to the benefits conferred, but will also impose additional strains upon an administrative mechanism already overburdened by the daily task of coping with the substantial demands of welfare administration. The state funds allotted for welfare are already inadequate. The legislature has not allotted any further funds to cover this $100 payment which is made *IN ADDITION TO* the regular benefits retroactive to the date of application, received by the applicant. The Department of Public Aid has made significant progress in correcting the situation and the record is utterly devoid of any proof of abuse of discretionary authority, malice, ill will, or intentionally unlawful conduct on its part.

It is submitted that the balancing process must be done in light of federal policy as established in congressional welfare legislation, that is, would the court ordered $100 payments assist or hinder the effectuation of federal welfare policies? The only remedy Congress contemplated for non-compliance with federal regulations with a prospective cut-off of funds. The District Court granted a remedy not contemplated in federal policy which the State believes not to be the best use of state funds in meeting

the current needs of its citizens. The Court below felt the necessity to deter the State from any non-compliance in the future.

Furthermore, the determination that the amount to be paid as an award would be $100 was clearly abusive. The order of payment of $100 in each case not processed within thirty days was clearly not based on any accurate amount actually owing to the applicants or any computation of their actual losses. It is to be noted that the figure of $100 is *not* the amount of benefits to which each particular applicant is entitled. The order states clearly that "*any* AFDC application pending more than thirty days . . . will entitle the applicant to $100 compensatory damages in addition to the regular benefits received."

The Court took no evidence whatever to determine whether $100 had any conceivable relationship to the actual damage suffered by each applicant. Manifestly the amount cannot be an accurate one for any loss, since each applicant's actual losses must vary greatly. It is obvious from the language of the Memorandum Opinion itself, that the $100 figure was a pure estimate. The Court said:

> "Plaintiffs suggest that the court simply estimate the amount of compensatory damages likely to be suffered by those who must wait longer than thirty days to have their applications processed and automatically award them that amount. That is, all those applicants who are declared to be eligible for AFDC assistance after the thirty-day period will receive *in addition* to all the statutory benefits they are entitled to a pre-determined sum of compensatory damages."

It is also obvious that the $100 amount came not from evidence, nor from any weighing by the District Court

of the suitability of this amount, but directly from the attorney for respondents. The District Court stated:

> "Plaintiffs assert that $100 would be a fair and reasonable figure. Subject to the limitations to be outlined, *infra*, I agree."

The District Court relied on *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) for the principle of law that "monetary damages are appropriate in cases of civil contempt to enforce compliance with court orders and/or statutes." It completely overlooked the actual holding of *McComb*, affirmed by the Circuit Court of Appeals for the Fifth Circuit, which is that the District Court erred in not enforcing compliance with its former decree by ordering the payment to employees of unpaid statutory wages under the Fair Labor Standards Act. The case is clear authority for the principle that the appropriate monetary damages in civil contempt are the *actual losses* of the injured parties.

It has been held that in civil contempt the amount of the indemnity or fine must be based on the actual loss or damage of the plaintiff as shown by evidence presented in the proceeding itself. The burden of proof is on the plaintiff. *Moore* v. *Polk Sanitary Milk Co.*, 209 Ind. 558, 200 N.E. 228, 233 (1936); *Nelson* v. *Progressive Realty Corp.*, 81 R.I. 445, 104 A. 2d 241 (1954).

Thus, in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947) this Court said:

> ". . . Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss . . ." (330 U.S. at 304).

The District Court in its Memorandum Opinion attempted to justify its arbitrary acceptance of the esti-

mate offered by plaintiffs' attorney by citing a decision of this Court:

> ". . . Moreover, the fact that the exact measure of damages is difficult to set, does not preclude recovery if it is certain that defendant's conduct has caused the damage. *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 562-563 (1931)."

The use of the word "recovery" immediately indicates that *Story Parchment Co.* has nothing to do with contempt, and is therefore completely irrelevant to the instant case. Actually it pertained to a jury verdict in an anti-trust action. In upholding the verdict of the jury, this Court referred to the difficulty of finding the damages with precision. Even here the Court remarked:

> ". . . In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate . . ." (282 U.S. at 563).

Petitioner respectfully submits that the District Court in the instant case acted purely on mere speculation or guess, with no evidence whatsoever presented from which the amount of the damages could be inferred. The accepted rule of law that a jury must do the best it can to return a verdict where elements of damage are uncertain is certainly no support for holding that in a compensatory contempt fine no evidence need even be offered to justify the amount.

Furthermore, the defendant's financial position must be considered if the contempt order is coercive. Assuming, arguendo, that the District Court had the power and did in fact make the payment of $100 a coercive sanction in

civil contempt, the law is settled that a court may not do so without considering the financial resources of the defendant and the serious effect of such an order.

In *United Mine Workers, supra,* at p. 304 of 330 U.S., this Court, after stating that a compensatory fine must be based upon evidence of complainant's actual loss, went on to say that other factors must be considered in coercive orders:

> "It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."

United Mine Workers was a combined civil and criminal contempt proceeding. The use of the words "correction" and "punishment" indicate the Court's consideration of the criminal as well as the civil contempt factor. Nevertheless, the financial resources test has been applied by Federal Courts in purely civil contempt proceedings.

United States v. *International Business Machines Corporation,* 60 F.R.D. 650, 652 (S.D.N.Y. 1973) states:

> "It is established that the financial resources of the contemnor are an important element in determining the amount of a fine imposed for the purpose of compelling compliance with an order . . ."

See also *Sweetarts* v. *Sunline, Inc.,* 299 F. Supp. 572, 579 (E.D. Mo. 1969).

The District Court, strangely enough, did weigh financial considerations in discarding alternative remedies. In refusing to order complete forfeiture of federal funds, the Court said:

> "The financial pressure it would impose upon the entire welfare system would be too great . . ."

In refusing retroactive damages the Court said:

> "It would be imprudent to jeopardize the complete and continuous flow of desperately needed welfare funds by assessing retroactive damages against an already financially and administratively overburdened state department of public aid."

Yet in ordering the $100 payments the Court did not consider defendant's financial or administrative position in any way.

The most devastating consequence of the upholding of the $100 monetary award is that the only way to enforce the District Court's order would be by proceeding to execute against the Illinois General Revenue fund, or, if this were exhausted, compelling the Executive Branch to seek or the Legislature to enact an appropriation from available tax revenues. The mere mention of such a possibility is enough to suggest the grave problems of comity involved between the Federal Court and the State.

Even if the action taken by the District Court and affirmed by the Seventh Circuit is deemed to be in keeping with the fundamental framework of federal-state relationships in the case of grants in aid for welfare programs, the Eleventh Amendment still stands as a bar to the granting of such monetary awards.

CONCLUSION

For all these reasons, it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1973 — September Session, 1973

Nos. 73-1252 and 73-1253
Gladys Rodriguez, et al.,
Plaintiffs-Appellees,

Mrs. Loretta Smith, et al.,
Plaintiffs-Intervenors-Appellees,

v.

Harold G. Swank, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69 C 2615
Bernard M. Decker *Judge.*

Heard November 30, 1973 — Decided May 9, 1974

Before CLARK, *Associate Justice of the United States Supreme Court,* Retired,[1] CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In October 1970, the district court ordered the Illinois Department of Public Aid

1. Associate Justice Tom C. Clark of the United States Supreme Court, Retired, is sitting by designation.

to process all applications for assistance under the Aid to Families with Dependent Children Program ("AFDC") within 30 days from the time they are filed.[2] A supplemental order was entered in February 1972 to enforce compliance with the earlier order. Because incomplete compliance persisted with respect to the 1970 order, plaintiffs moved in October 1972 for further remedies, suggesting two possible solutions. The first was a "presumptive eligibility" concept whereby any applicant who had an unprocessed AFDC application on file for 30 days would be presumed eligible and immediately mailed an assistance check, as in *Class* v. *White* (D. Conn. Civ. No. 14704, 1972). The other alternative suggested was adopted by the district court to enforce compliance with its 1970 order. Thus on November 9, 1972, the court directed that after February 1, 1973:

> "*any* AFDC application pending more than thirty days, through no fault of the applicant, and subsequently acted upon favorably, will entitle the applicant to $100, compensatory damages in addition to the regular benefits received." (emphasis in original)

The court's opinion described this sanction as a "supplementary remedy." In colloquy with counsel, the judge explained:

> "The purpose, and the only purpose, that I have in mind, is to insure — It's another incentive insofar as the Department is concerned to apply. I mean, to process all applications as they are required to do within the 30 days, that's the only purpose of it."

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2. This was the time period then provided by regulation, and this order was clearly correct. See *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970), affirmed, 403 U.S. 901.

Consequently, he gave the defendants three months to begin complying with the court decree or begin paying $100 to every AFDC applicant whose rights were violated. He refused to order the presumptive eligibility remedy also suggested by plaintiffs. We affirm.

Because of related issues involved in *Edelman* v. *Jordan*, 42 LW 4419, we entered a hold order postponing a decision herein until after the Supreme Court rendered its decision in that case. On March 25, 1974, the Supreme Court decided *Jordan* and held that the Eleventh Amendment precluded the award of retroactive benefits to persons eligible for aid to the Aged, Blind and Disabled.

The *Jordan* opinion carefully confined its holding to retroactive benefits to be paid by Illinois state officials. The Supreme Court noted that sovereign immunity "is no bar to that part of the District Court's judgment that prospectively enjoined petitioner's predecessors from failing to process applications within the time limits established by the federal regulations." 42 LW 4423. Justice Rehnquist pointed out that *Ex parte Young*, 209 U.S. 123, justified the relief awarded by the district court in the prospective portion of its order in *Jordan*. He added that a suit is not barred merely because it has a prospective impact on the state treasury:

> "The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasures than did that awarded in *Ex parte Young*. In *Graham* v. *Richardson*, 403 U.S. 365 (1971), Arizona and Pennsylvania

> welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing." (42 LW 4424).

The injunction approved in *Jordan* ordered compliance with the federal regulations. It therefore corresponds to the 1970 injunction in this case. The order before us is a civil contempt order designed to bring about compliance with the 1970 injunction. Under certain circumstances of non-compliance, this order might have a greater fiscal impact than the 1970 injunction alone. But that does not render this order invalid. *Jordan* indicated that the Eleventh Amendment would not bar the payment of state funds "as a necessary consequence of compliance in the future with a substantive federal question determination." 42 LW 4424. But it did not stop there. The opinion went on to imply that payment of state funds could be ordered as "a form of compensation to those whose applications were processed on a slower time schedule" when state officials were under a "court-imposed obligation to conform to a different standard." 42 LW 4424. Such compensation is one of the effects of the order under review.

The power to order compliance with federal regulations would be meaningless if the injunction were unenforceable. It should not be forgotten that *Ex parte Young* denied a habeas corpus petition brought by the Attorney General of Minnesota, who had been fined and committed to the custody of the federal Marshal for contempt of a federal injunction. 209 U.S. at 126, 168. The Eleventh Amendment does not limit a federal court of equity to one inflexible remedy. Neither does the Social Security Act.

The argument that forfeiture of federal funds is the exclusive remedy in cases such as this was rejected in *Rosado* v. *Wyman*, 397 U.S. 397, 420. The district court here reasonably concluded that "complete forfeiture of federal funds would be too harsh a remedy to impose upon the state * * *." Of course, if defendants prefer that remedy, they may at any time voluntarily forfeit federal funds and relieve themselves of any obligation to comply with federal regulations.

The remedy adopted here was well within the district court's discretion. "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States* v. *Mine Workers*, 330 U.S. 258, 303-304. The order here serves both purposes, but primarily the coercive one. Money payments contingent on non-compliance are a traditional means of enforcing injunctions. See 330 U.S. 305.

Here the court dealt patiently with defendants for more than two years, attempting unsuccessfully to gain compliance with its injunction. When the court finally entered the supplementary order which is the subject of this appeal, it gave defendants three additional months of grace. Only in the continued absence of compliance was $100 to be awarded to those whose applications were not timely processed. Accordingly, the fiscal consequence to the state treasury was the necessary result of attempts to gain compliance with a decree which by its terms was prospective in nature. "Such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in *Ex parte Young*, *supra*. 42 LW 4424.

Defendants' remaining contentions are unpersuasive. Exhaustion of state remedies is irrelevant to a proceeding to enforce a federal injunction. The amendment of the regulations during the pendency of this appeal to allow 45 days for processing applications is similarly irrelevant. It is a matter to be taken up with the district court on a motion to modify the injunction, perhaps retroactively to the date of the amendment. Defendants were not denied due process in the oral argument in the district court; if there were any error, it was cured in proceedings on defendants' subsequent motion to vacate.

For the reasons given by the district court, we agree that it properly refused to adopt the remedy of presumptive eligibility, as urged by plaintiffs in their cross-appeal. The cross-appeal also seeks an advisory opinion as to whether presumptive eligibility would have been a permissible alternative remedy if the remedy actually given had been denied. We decline to render such an opinion. *Muskrat* v. *United States*, 219 U.S. 346.

The order is affirmed.

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.